87-1426

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DEVON BANK, an Illinois
banking corporation,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC., a corporation

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Arthur W. Friedman
Miller, Shakman,
Nathan & Hamilton
208 S. LaSalle Street
Chicago, IL 60604
(312) 263-3700
Counsel for Petitioner

QUESTION PRESENTED

May a Federal Court in a diversity case -- where state law (here Illinois) supplies the rule of decision and there is no Illinois Supreme Court case on point -- reject a decision of the Illinois Appellate Court, which is binding on Illinois trial courts and which is the only Illinois Appellate Court decision construing the Illinois statute involved?

RULE 28.1 LIST

This petition is being filed by Devon Bank, an Illinois banking corporation. Pursuant to Rule 28.1, Devon Bank is a subsidiary of Devon Bancorp, Inc., which is a Delaware corporation.

LIST OF PARTIES

The Plaintiff-appellant in the United States Court of Appeals for the Seventh Circuit was Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc., a Delaware corporation. The Defendant-appellee in the Seventh Circuit was Petitioner Devon Bank, an Illinois banking corporation.

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TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

The petitioner Devon Bank respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for

the Seventh Circuit, entered on October 29, 1987.

OPINIONS BELOW

The decision of the Court of Appeals for the Seventh Circuit from which certiorari is sought, dated October 29, 1987, reversing the decision of the district court, is reported at 832 F.2d 805 (7th Cir. 1987). It appears as Appendix A hereto. The order of the Seventh Circuit denying the petition for rehearing, dated November 27, 1987, is unreported and appears as Appendix B hereto.

The memorandum decision of the United States District Court for the Northern District of Illinois, Eastern Division (Leighton, J.), is reported at 654

F.Supp. 506 (N.D.Ill. 1987). It appears as Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 29, 1987, reversing the decision of the District Court. The Court of Appeals denied a timely Petition for Rehearing and Suggestion for Rehearing In Banc on November 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Ill. Rev. Stat. ch. 26 §4-301(1)

Ill. Rev. Stat. ch. 26 §4-213

Ill. Rev. Stat. ch. 26 §4-109

STATEMENT OF THE CASE

1. Background Facts.

In 1979 Manus, Inc. ("Manus") maintained a checking account at Devon Bank ("Devon"). On July 26, 1979, Manus wrote a check on its account at Devon in the amount of $647,250 (the "Manus Check"), which was payable to the order of Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). The Manus Check arrived at Devon on Wednesday, August 1, 1979, when Devon was closed to the public (except for its walk-up and drive-up windows).

On July 27, 1979, Manus had deposited into its account at Devon a check payable to Manus in the amount of $647,250 (the "CRM Check"). When the Manus Check arrived at Devon on August 1, 1979, Continental Bank had not advised Devon

that the CRM Check was being returned unpaid for insufficient funds. Accordingly, Devon commenced the processing of posting the Manus Check on the erroneous assumption that there were sufficient collected funds in the Manus account.

Devon learned for the first time on August 3 at 4:10 p.m. that the CRM Check had not cleared, and that accordingly there were insufficient collected funds in the Manus Account to pay the Manus Check. Twelve minutes later -- at 4:22 p.m. on August 3 -- Devon gave notice of dishonor of the Manus Check.

2. Proceedings in the District Court.

Merrill Lynch sued Devon in the District Court, alleging that Devon's dishonor of the Manus Check had not been timely. Merrill Lynch argued that

Devon's statutory "midnight deadline" for the return of the Manus Check was midnight of August 2. Merrill Lynch also argued that Devon had "completed the process of posting" the Manus Check under Section 4-109 of the Illinois Uniform Commercial Code before Devon's dishonor on August 3.

Devon argued that its statutory midnight deadline was midnight of August 3 (not midnight of August 2), and that Devon had not completed the process of posting the Manus Check prior to its dishonor on the afternoon of August 3.

The District Court granted summary judgment to Devon, holding that Devon's dishonor of the Manus Check had been timely. On appeal, the Seventh Circuit agreed with the District Court that Devon's midnight deadline was midnight of

August 3. But the Seventh Circuit disagreed with the District Court on the "process of posting" issue.

REASON FOR GRANTING THE WRIT

The relationship between state and federal courts with respect to issues of state law is a fundamental element of our jurisprudence. It has been more than forty years since this Court articulated the nature of that relationship. See:

1. West v. American Telephone & Telegraph Company, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940);

2. Six Companies of California v. Joint Highway District No. 13 of the State of California, 311 U.S. 180, 61 S.Ct. 186, 85 L.Ed. 114 (1940);

3. Fidelity Union Trust Company v. Field, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109 (1940);

4. King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S.Ct. 488, 92 L.Ed. 608 (1947).

These cases establish the following rule of law: In a diversity case governed by state law, where the state's highest court has not addressed the issue, a federal court must follow the law as announced by the state's intermediate appellate court (assuming as here, that its decisions are binding on state trial courts), unless there is convincing evidence that the law of the state is otherwise.

The decision of the Seventh Circuit in this case implicitly rejects that rule of law. The Seventh Circuit, in effect, has

chosen to make state law, rather than to apply state law as announced by the Illinois Appellate Court in the only Illinois Appellate decision construing the Illinois statute involved.[1/]

The decision of the Seventh Circuit in this case is not the only case in which a United States Court of Appeals has deviated from the standard enunciated by this Court in the preceding cases.

In view of the importance of the principle involved to the administration of justice throughout the federal court system, this Court should take this opportunity to reestablish uniformity

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[1/] The Illinois Supreme Court has never addressed the issue. A decision of the Illinois Appellate Court is binding on Illinois trial courts. People v. Thorpe, 52 Ill.App.3d 579, 579, 367 N.E.2d 960, (2d Dist. 1977)

with respect to the criteria to be used by federal courts in deciding issues of state law.

In This Case Illinois Law Governs

Since this is a diversity action, Illinois law applies. The provisions of the Illinois Uniform Commercial Code, Ill.Rev.Stat., ch. 26, relevant to this case are as follows (emphasis added in each instance):

Section 4-301(1):

> "Where an authorized settlement for a demand item . . . received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment (subsection (1) of Section 4-213) and before its midnight deadline it
>
> (a) returns the item; . . .

Section 4-213(1)(c):

"(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

. . .

"(c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith."

Section 4-109:

"The 'process of posting' means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

(a) verification of any signature;

(b) ascertaining that sufficient funds are available;

(c) affixing a "paid" or other stamp;

(d) entering a charge or entry to a customer's account;

(e) correcting or reversing an entry or erroneous action with respect to the item."

As noted above, one of the steps in the "process of posting" an item -- as that term is defined in Section 4-109 -- is

"(e) correcting or reversing an entry or erroneous action with respect to the item."

It is Devon's position that in giving notice of dishonor and returning the Manus Check on August 3, 1979, Devon was "correcting or reversing an entry or erroneous action with respect to the item." Thus, Devon had not "completed the process of posting" the Manus Check prior to August 3, 1979.

A Decision of the Illinois Appellate Court is Binding on Illinois Trial Courts

There is no decision of the Illinois Supreme Court construing the meaning of Section 4-109(e). The only Illinois Appellate Court case on point is Brown v. South Shore National Bank, 1 Ill.App.3d 136, 273 N.E.2d 671 (1st Dist. 1971). A decision of an Illinois Appellate Court is binding on Illinois trial courts. People v. Thorpe, 52 Ill.App.3d 576, 579, 367 N.E.2d 960, (2d Dist. 1977).

The Brown Case

In Brown a check payable to the plaintiff was presented to the defendant South Shore National Bank on February 28, 1967. The South Shore Bank paid the check on February 28. As the Appellate Court noted, "the records of the bank

also indicate[d] that the check was paid, posted and charged to the account . . . on that date." Two days later -- on March 2 -- the bank returned the check marked "Paid in Error," noting that the signature on the check was not on file.

The plaintiff sued, claiming (as Merrill Lynch does in this case) that the bank had completed the process of posting the check prior to the dishonor and return. The Illinois Appellate Court in a unanimous decision rejected that contention (1 Ill.App.3d at 138-139, 273 N.E.2d at 672):

> . . . . Ill.Rev.Stat. 1965, ch. 26, par. 4-109 defines "process of posting" as follows:
>
> The 'process of posting' means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the

following or other steps as determined by the bank:

> (a) verification of any signature;
>
> (b) ascertaining that sufficient funds are available;
>
> (c) affixing a "paid" or other stamp;
>
> (d) entering a charge or entry to a customer's account;
>
> (e) correcting or reversing an entry or erroneous action with respect to the item. (Emphasis added by the Brown Court.)

It is clear that the process of posting involves several steps some of which are those specified by plaintiff. The mere fact that some of those steps were taken does not mean that the process was completed. The affixation of the stamps and the entry on the customer's account are but part of the process. Also included is the judgmental step of signature verification and, if necessary, correction or reversal of erroneous action. The act of the defendant in returning the check to plaintiff's bank demonstrated that

> the posting process was not completed, regardless of the entry on the "statement of account" and the stamps placed on the check. Because the posting process had not been completed acceptance had not occurred. Thus defendant was not obligated to pay. (Emphasis added.)

The District Court in this case cited and relied upon the decision in Brown. The District Court held as follows (654 F.Supp. at 510, emphasis added):

> Here, as in Brown, the "correcting an entry or erroneous action" which is provided by §4-109(e) allowed Devon, after learning that the Manus account had insufficient funds, to correct the entry which erroneously indicated that the funds were sufficient. In this regard, Devon's returning the check to Crocker demonstrated that the posting process was not completed, regardless of the entry on the statement of account and stamps, placed on the check. Brown, 1 Ill.App.3d at 139, 273 N.E.2d at 673. Accordingly, final payment was not made by Devon because the posting process was not completed until it was allowed to

correct the erroneous entry. Ill.Rev.Stat. ch 26, §4-213(1) (1985).[2/]

[2/] In an earlier decision the Seventh Circuit had acknowledged that it is appropriate to defer to a district judge as to questions of state law, especially where that judge has had experience in dealing with questions of state law. See Goldstick v. ICM Realty, 788 F.2d 456, 466 (7th Cir. 1986):

> ". . . we follow the practice in diversity cases of giving substantial deference to the district judge's interpretation of the law of the state in which the judge sits. [Citations omitted.] This precept is especially applicable here, given Judge Shadur's long experience in commercial practice in Illinois before his appointment to the bench."

That precept should also have been applied in the instant case; the District Judge (Hon. George N. Leighton) had sat on the Illinois Appellate Court for many years before his appointment to the District Court.

The Seventh Circuit Erred in Refusing to Follow The Illinois Appellate Decision In Brown

The Seventh Circuit devoted 5 pages of its 11 page opinion to the construction of the UCC sections involved by courts applying the state law of other states[3/], and by commentators. The Seventh Circuit confined its discussion of Illinois law and the Brown case to a single paragraph

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3/ As discussed in our brief in the Seventh Circuit, the decisions involving the laws of other states and relied upon by the Seventh Circuit even if they were applicable, do not support Merrill Lynch's position. Excerpts from that brief appear at Appendix D. One of the cases to which the Court of Appeals referred, Nelson v. Platte Valley State Bank & Trust Co., 805 F.2d 332 (8th Cir. 1986), was cited by Merrill Lynch for the first time in its reply brief. While that decision analyzes that case as if Section 4-109 were part of the Nebraska Uniform Commercial Code, in fact Section 4-109 of the UCC was not adopted in Nebraska.

(Appendix A, at pp. 23-25). In that discussion, the Court stated:

> . . . [T]he last paragraph of Brown contains this line: "The act of the defendant in returning the check to plaintiff's bank demonstrated that the posting process was not completed, regardless of the entry on the 'statement of account' and the stamps, placed on the check." 1 Ill.App.3d at 139; 273 N.E.2d at 673." This statement was unnecessary to the decision and is unreasoned; this dictum does not lead us to believe that the Supreme Court of Illinois will adopt the rationale of West Side.[4/] (Emphasis added.)

In so holding the Court of Appeals erred in two important respects. First, the Court articulated no basis and had no

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[4/] The West Side case to which the Seventh Circuit referred was a decision of the Wisconsin Supreme Court, West Side Bank v. Marine National Exchange Bank, 37 Wis.2d 661, 155 N.W.2d 587 (1968).

basis for concluding that the sentence quoted above was mere dictum. Second, the Court ignored the rule of law announced in the decisions of this Court noted at the beginning of this petition concerning the role of federal courts as to issues of state law in diversity cases.

1. The sentence in Brown described by the Seventh Circuit as dictum is part of the following paragraph (only the sentence in question is underscored):

> It is clear that the process of posting involves several steps some of which are those specified by plaintiff. The mere fact that some of those steps were taken does not mean that the process was completed. The affixation of the stamps and the entry on the customer's account are but part of the process. Also included is the

> judgmental step of signature verification and, if necessary, correction or reversal of erroneous action. The act of the defendant in returning the check to plaintiff's bank demonstrated that the posting process was not completed, regardless of the entry on the "statement of account" and the stamps placed on the check. Because the posting process had not been completed acceptance had not occurred. Thus defendant was not obligated to pay.

A fair reading of that paragraph demonstrates that the sentence quoted by the Court is not dictum. Indeed, that language is an integral part of the holding, as the District Judge found.

In Larson v. Johnson, 1 Ill.App.2d 36, 40, 116 N.E.2d 187, (1st Dist. 1953), the Court discussed the meaning of "dictum" as follows:

> Whether a legal proposition stated in an opinion is obiter dictum is to be determined from a reading of the entire opinion. If the opinion

> expressed on a legal question is one casually reached by the court on an issue unrelated to the essence of the controversy or based on hypothetical facts, then it is obiter dictum. If, however, the question involved is one of a number of legal issues presented by the facts of that particular case, the court's decision on that question is not dictum even though it be the last ground of many decided by the court, all in support of its final conclusion. (Goodhart, 40 Y.L.J. 161, 180.)

The sentence in the Brown opinion underscored above cannot be described as an opinion "casually reached by the court on an issue unrelated to the essence of the controversy or based on hypothetical facts." The sentence in question is part of the single paragraph stating the Court's holding. Reading that paragraph and the rest of the opinion as a whole, the Court's description of the one sentence as "dictum" is incorrect.

Significantly, in Cole v. Young, 817 F.2d 412, 422, n. 7 (7th Cir. 1987), the Seventh Circuit rejected the dissent's description of language as dictum where no reason for that description is offered. The dissent in Cole was written by the author of the opinion in the instant case.

2. The Seventh Circuit impermissibly rejected Brown out of hand. Brown is the only Illinois case construing Section 4-109(e).[5/] The Seventh Circuit may not

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[5/] The Seventh Circuit noted the decision in Go-Tane v. Sharp, 78 Ill.App.3d 785, 397 N.E.2d 916 (2d Dist. 1979). But that case does not even purport to construe Section 4-109(e) -- the provision dealing with "correcting or reversing an entry or erroneous action." There is not a hint that the Court was attempting to question the holding in Brown, which is not even cited. And it appears that the decision of the Seventh Circuit in this case was

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like the holding in Brown, but that is the law in Illinois and under the Supreme Court authority noted above and discussed below, the Seventh Circuit was not at liberty to ignore it.

Decisions of This Court as to the Relationship Between State and Federal Courts

In West v. American Telephone & Telegraph Company, 311 U.S. 223, 61 S.Ct. 1979, 85 L.Ed. 139 (1940), this Court stated that "where an intermediate appellate state court rests its considered judgment upon the rules of law

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not based on Go-Tane, since the Court stated:

> "We need not resolve any tension between Brown and Go-Tane to conclude that the dictum in Brown is not the law in Illinois today."

which it announces, that is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." 85 L.Ed. at 144.

"Other persuasive data" cannot be simply the federal court's disagreement with the reasoning of the state court. As this Court in West went on to hold (85 L.Ed. at 144-145):

> Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the West Case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. If the present suit had been brought in the Cuyahoga county court no reason is advanced for supposing that the Cuyahoga court of appeals would depart from its previous ruling or

> that the Supreme Court of the state would grant the review which it withheld before. We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation. (Emphasis added.)

This Court in West reversed the decision of the Sixth Circuit because the latter had failed to rule in accordance with the decision of the state intermediate appellate court.

In West, the decision of the Ohio intermediate appellate court had involved the same parties that were involved in the subsequent federal court litigation, and the Ohio Supreme Court had declined to review the ruling of the Ohio

intermediate appellate court. But those facts do not form the touchstone of this Court's opinion. This Court referred to two other decisions, which it rendered on the same day and which are instructive as to the meaning of the three decisions.

In Six Companies of California v. Joint Highway Dist. No. 13 of the State of California, 311 U.S. 180, 61 S.Ct. 186, 85 L.Ed. 114 (1940), this Court held that the Ninth Circuit had erred in failing to follow state law as announced by the California intermediate appellate court (in the case of Sinnott v. Schumacher). This Court stated (85 L.Ed. at 117-118, emphasis added):

> The decision in the Sinnott Case was made in 1919. We have not been referred to any decision of the Supreme Court of California to the contrary. We thus have an announcement of the state law by an

> intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the state is otherwise . . . . The [Ninth] Circuit Court of Appeals should have followed the decision of the state court in Sinnott . . .

To the same effect is Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109 (1940). In that case this Court reversed the Third Circuit Court of Appeals, holding that the Third Circuit should have applied the law of New Jersey as stated by the New Jersey Court of Chancery. This Court stated as follows (85 L.Ed. at 113, emphasis added):

> An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination in the absence of more convincing evidence of what the state law is, should be

followed by a federal court in deciding a state question.

Fidelity Union Trust Company has since been cited with approval by this Court. See, Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), in which this Court noted as follows (31 L.Ed.2d at 416, n. 3) (emphasis added):

> We were informed in oral argument that the Court of Appeals of Georgia is a court of statewide jurisdiction, the decisions of which are binding upon all trial courts in the absence of a conflicting decision of the Supreme Court of Georgia. Federal courts therefore follow these holdings as to Georgia law. (Citations omitted.)

In the instant case, the Seventh Circuit did not follow these precedents and instead concluded that Brown is not Illinois law, based only on decisions in

other states and on commentary. This is impermissible.

The decision of this Court in King v. Order of United Commercial Travelers of America, 333 U.S. 153, 92 L.Ed. 608 (1947), is also instructive. In that case this Court held that a decision of a state court of common pleas (a trial court) was not binding on the federal courts. In so holding, however, this Court emphasized that its ruling was based on the fact that the decision of the Court of Common Pleas was not binding on any other state court (92 L.Ed. at 613, emphasis added):

> Thus a Common Pleas decision does not, so far as we have been informed, of itself evidence one of the 'rules of decision commonly accepted and acted upon by the bar and inferior courts.' Furthermore, as we have but recently had occasion to remark, a federal court

> adjudicating a matter of state law in a diversity suit is, 'in effect, only another court of the State;' it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

In the instant case, by contrast, the appellate decision in Brown is binding on Illinois trial courts. See, e.g., People v. Thorpe, supra.

The Instant Case Is Not The Only Case In Which This Court's Standard Has Not Been Followed

The Third, Fifth, Eighth and Tenth Circuits have generally followed the foregoing Supreme Court decisions. See, e.g., Acanda, Inc. v. Aetna Cas. & Ins. Co., 764 F.2d 968, 973 (3rd Cir. 1985);[6/]

6/ ". . . we believe that Vale [an intermediate Pennsylvania appellate court] authoritatively states the present

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Flinkote Co. v. Dravo Corp., 678 F.2d 942, 945 (5th Cir. 1982);[7] R.W. Murray Co. v. Shatterproof Class Corp., 697 F.2d 818, 826 (8th Cir. 1983);[8] Weiss v.

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law of Pennsylvania. It is not our function sitting in diversity to analyze the wisdom of the controlling state law." (Emphasis added.)

7/ "In determining the law of the state, federal courts must follow the decisions of the state's highest court, and in the absence of such decisions on an issue, must adhere to the decisions of the state's intermediate appellate courts unless there is some persuasive indication that the state's highest court would decide the issue otherwise. (Citations omitted.) 'Only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule.' (Citations omitted.)" (Emphasis added.)

8/ "Initially we note that in reviewing the district court's determination of Missouri law in the instant case, our task, as was that of the district court, the state, but merely to ascertain and apply it.' (Citation omitted.)" (Emphasis added.)

United States, 787 F.2d 518, 525 (10th Cir. 1986).[9/]

The Ninth Circuit, however, has applied conflicting criteria. In Manalis Finance Co. v. United States, 611 F.2d 1270, 1272 (9th Cir. 1980), the Ninth Circuit acknowledged that on previous occasions it had applied differing standards (emphasis added):

> The district court cited Bosch[10/] to support the statement that it [the district court] was "not bound by the decision of the state Court of Appeal." 442 F.Supp. at 582. The government argues that the court misapplied

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9/ "In predicting how a state's highest court would rule, federal courts must follow intermediate state court decisions, policies underlying the applicable legal principles, and the doctrinal trends indicated by these policies. (Citation omitted.)"

10/ Commissioner v. Estate of Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967).

Bosch and should have applied a test such as that in Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109 (1940), which says:

> An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

Id. at 177-78, 61 S.Ct. at 178.

> This Circuit has used language similar to that in Fidelity Union Trust. [Citations omitted.] Recently it has also quoted and applied the Bosch standard. [Citations omitted.]

The Ninth Circuit concluded that "Under either standard, the District Court's analysis . . . was proper." (Emphasis added.)

The Ninth Circuit in Manalis thus noted that on occasion it had applied the standard used by the district court in

that case and that on other occasions, it had applied the standard announced by this Court in the Fidelity Union Trust Co. (the standard we urge here).

There should be only one standard. It is essential for this Court to reestablish uniformity -- which is critical to the proper functioning of federal courts where state law governs.

CONCLUSION

A federal court sitting in Illinois is in effect another court of the state of Illinois. Illinois trial courts are required to follow the decisions of the Illinois Appellate Court. A federal court in Illinois is not at liberty to spurn a decision of the Illinois Appellate Court without convincing evidence that the law of Illinois is

otherwise. In the instant case, the Seventh Circuit disregarded clear Illinois precedent and made its decision as to what the law of Illinois is based only upon an analysis of the law of other states and commentary.

We respectfully urge this Court to review this case.

Respectfully submitted,

_____
One of the Attorneys
for Devon Bank

Arthur W. Friedman
MILLER, SHAKMAN, NATHAN & HAMILTON
208 South LaSalle Street
Chicago, Illinois 60601
263-3700

APPENDIX A

APPENDIX A

Merrill Lynch, Pierce,
Fenner and Smith, Inc.,
Plaintiff-Appellant,

v.

Devon Bank, an Illinois banking
corporation, Defendant-Appellee

No. 87-1333

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Argued October 2, 1987

Decided October 29, 1987

Peter A. Cantwell, Cantwell & Balonick, Chicago, Illinois, for plaintiff-appellant.

Arthur W. Friedman, Miller, Shakman, Nathan & Hamilton, Chicago, Illinois, for defendant-appellee.

Before BAUER, Chief Judge, and FLAUM and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Manus, Inc., gave the Los Angeles office of Merrill Lynch, Pierce, Fenner &

Smith, Inc., a check for $647,250 payable to Merrill Lynch's order. The check was drawn on Devon Bank in Chicago. Merrill Lynch immediately deposited the check with Crocker National Bank in Los Angeles; a clearing house presented the check to Devon for payment at 9:30 a.m. on Wednesday, August 1, 1979. The clearing house and Devon provisionally settled for the check immediately. Under §4-301(1) of the Uniform Commercial Code, Devon had to decide no later than midnight of the next banking day whether to make final payment. See Ill. Rev. Stat. ch. 26 [para.] 4-301(1). Devon gave notice of dishonor at 4:22 p.m. on August 3. If this is too late, Devon is liable on the check even though Manus cannot cover the instrument. The district court thought the dishonor timely, 654 F. Supp. 506 (N.D. Ill.

1987), and granted summary judgment to Devon in this diversity litigation.

I

The initial question is whether Devon gave notice of dishonor before the deadline on midnight of the "banking day" after it received the instrument. Under §4-104(1)(c) of the UCC, a "'banking day' means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions". On Wednesday, August 1, 1979, Devon's lobby was closed to the public. It offered services, essentially limited to deposits and withdrawals, at a walk-up window. No one could open an account or arrange for a loan; so far as the record reveals, no one could draw down a line of credit previously arranged. Merrill Lynch observes that on

Wednesdays Devon processed checks and made inter-bank loans, but neither those nor related activities made it "open to the public" for "substantially all of its banking functions".

Devon is an Illinois bank, and a "bank" in Illinois is "any person doing a banking business whether subject to the laws of this or any other jurisdiction." Ill. Rev. Stat. ch 17 [para.] 302 (1986). So a person doing a "banking business" but not subject to anyone's laws is not a "bank", but the statute does not illuminate on "banking business". Perhaps the statute uses a circular definition because the elements of banking are not particularly obscure. Making loans is a necessary part of "banking"; consider the definition of a "bank" in the Bank Holding Company Act, the only federal

statute defining the term: "an institution . . . which both (i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and (ii) is engaged in the business of making commercial loans." 12 U.S.C. §1841(c)(1)(B) (1987); see Board of Governors v. Dimension Financial Corp., 474 U.S. 361, 106 S. Ct. 681, 88 L.Ed.2d 691 (1986). Banks are financial intermediaries, facilitating transactions between those who want to lend and those who want to borrow. Cf. Arthur Allen Leff, The Leff Dictionary of Law, 94 Yale L.J. 1855, 2127 (1985). Devon, which was open to the public for only the deposit side of the banking business on August 1, 1979, was not open for "substantially all" of the services of a bank. Its services on August 1 were

less extensive than those offered by a "nonbank bank" for purposes of the Bank Holding Company Act. Devon's walk-up window may have been a "branch bank", for both state and federal law define branches as places where deposits are received or money lent. 12 U.S.C. §36(f); Ill. Rev. Stat. ch. 17 [para.] 302 (1986). One of these is not "substantially all" of the bank's functions, however. The district court properly resolved this question by summary judgment. It would unacceptably disrupt commercial relations to put to a jury, case-by-case, the question whether a given day was a "banking day". Billions of dollars in transactions must be processed by every midnight deadline, and everyone has an interest in having this time defined with precision. The record supplies enough information to

make decision possible. Devon's midnight deadline was 11:59 p.m. on Friday, August 3, 1979.

II

The midnight deadline is only the outside limit, however. Section 4-301(1) allows a bank to return an item if it acts "before it has made final payment (subsection (1) of Section 4-213) and before its midnight deadline" (emphasis added). Section 4-213(1) says that a settlement becomes final "when the bank has done any of the following, whichever happens first". The only subsection we need consider is §4-213(1)(c), which provides that payment becomes final when the bank has "completed the process of posting the item to the indicated account of the drawer, maker, or other person to be charged therewith". Section 4-109

defines the process of posting, to which we return after stating some undisputed facts.

Manus, the maker of the check, had a subsidiary, Cash Reserve Management, Inc. Cash Management maintained an account in Boston. Manus gave its check to Merrill Lynch on July 26; on July 27 Manus deposited in Devon a check for an identical sum of which Cash Management was the maker. Devon promptly submitted that check for payment. Devon places a "hold" of three or four business days on uncollected funds. The Manus check was presented for payment on August 1, the fourth business day (the fifth if Devon counted Saturday, July 28).

When Devon receives a bundle of checks from its clearing house, its computers tally the checks to ensure that the clearing house has debited Devon the

correct amount. During the evening, reader/sorter machines read the account code on each check and compute the balance in each active account; a computer compares the balance and activity information with information the bank maintains to facilitate the decision whether to pay checks. The computer prepares, by the morning of the next business day, several reports for the bank's staff. One report lists checks that have caused overdrafts in the account; another report lists checks that are subject to stop payment orders; a third report lists accounts in which uncollected funds are essential to cover the latest checks; there are more. The morning of the second business day, Devon returns most of the checks that appear on these lists -- though its staff may elect to pay some of them. The bookkeeping

department stamps checks "paid" and photographs them. Devon then examines the signatures on substantial checks. If the signature appears genuine (or if the bank elects not to examine the signature), Devon places the check in the customer's file. This process usually is completed in the afternoon.

Manus's check was processed in the ordinary course. The account contained about $ 1.2 million, more than enough to cover the check. About $ 650,000 of this represented the Cash Management check deposited on July 27. Devon's computer treated these as "collected" funds because the check had been deposited four or more business days ago. The uncollected funds reports of August 1 and 2 do not flag the Manus check. Devon verified the signature and placed the Manus check in the file during the

afternoon of August 2. There it remained until 4:10 p.m. on August 3, when Continental Illinois National Bank told Devon by telephone that Cash Management's bank in Boston had dishonored the check of July 27. At 4:22 p.m. Devon gave telephonic notice of dishonor of the Manus check. Crocker Bank resubmitted the Manus check, which was dishonored a second time; Manus was placed in receivership on August 28.

Merrill Lynch, which prefers collecting from a solvent Devon Bank to standing in line as one of Manus's creditors, maintains that Devon "completed the process of posting the item" within the meaning of §4-213(1)(c) during the afternoon of August 2, when it placed the check in the file. Devon had carried out all the steps in its ordinary process and planned to do nothing

further. The process was free from operational error; no steps had been omitted, no judgmental blunders made along the way. Devon replies that it does not intentionally pay checks written against uncollected funds, to which Merrill Lynch responds that Devon made a business judgment to pay checks written against instruments that had been on deposit for four business days. Devon applied that rule to Manus's check, and the belated return of the item may show that four days was too short but does not undermine the conclusion that "the process of posting" had come to an end.

The district court sided with Devon, 654 F. Supp. at 509-10, relying on §4-109, which provides:

> The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the

following or other steps as determined by the bank:

(a) verification of any signature;

(b) ascertaining that sufficient funds are available;

(c) affixing a "paid" or other stamp;

(d) entering a charge or entry to a customer's account;

(e) correcting or reversing an entry or erroneous action with respect to the item.

Devon completed its ordinary steps, including each of (a) through (d), but the court concluded that §4-109(e) gives a bank the privilege to dishonor a check until the midnight deadline. To return the item is to "reverse" the entry. As the court put it, " Devon's returning the check . . . demonstrated that the posting process was not completed" (654 F. Supp. at 510).

This reading of §4-109(e) rips §4-213(1)(c) out of the Uniform Commercial

Code. Section 4-301(1) sets the midnight deadline as the last instant at which a check may be returned; §4-213(1) lists four events that terminate the return privilege sooner. If the return of an item establishes that the "process of posting" was not completed, then §4-213(1)(c) is meaningless. It is not beyond belief that statutes contain meaningless provisions but a court should treat statutory words as dross only when there is no alternative. The Uniform Commercial Code is an uncommonly well drafted statute, with links among its provisions. Section 4-213(1) is there for a reason -- to expedite the final settlement on checks, so that banks such as Devon Bank may make funds available to customers faster. The "midnight deadline", and "deferred posting" in general, is a concession to the flux of

paper with which any bank must contend. See Official Comment 1 to §4-301. Section 4-213(1)(c) provides that final payment should not take any longer than the bank actually requires to process each item. That function would be defeated if the bank could reverse any posting under §4-109(e) until the midnight deadline.

Perhaps §4-213(1)(c) causes more trouble than it is worth. It potentially calls for a case-by-case inquiry into the details of posting; a bank may defeat its function by dragging out its normal processes so that they consume the entire period allotted by §4-301(1); the drawee's bank cannot rely on §4-213(1)(c) to credit a customer's account, because it does not know how long the drawer's bank takes to post any given item. Considerations of this sort led the UCC's

Permanent Editorial Board, now at work on a Uniform New Payments Code, to propose the repeal of §4-213(1)(c). See Uniform New Payments Code P.E.B. Draft No. 3 at 267-68 (1983) (calling the criteria of §4-109 "unworkable in locating the precise time of payment"). Draft No. 3 was not adopted, though for reasons unrelated to §§4-109 and 4-213(1)(c); the Board continues to contemplate the problem. See Fred H. Miller et al., Commercial Paper, Bank Deposits and Collections, and Commercial Electronic Fund Transfers, 42 Bus. Law. 1269, 1288 (1987). Until the Board makes a final revision in the model UCC and states delete §4-213(1)(c) -- if that should occur -- our job is to enforce the statute.

That §4-213(1)(c) has meaning is reinforced by Official Example 3 to §4-109:

> A payor bank receives in the mail on Monday an item drawn upon it. The item is sorted and otherwise processed on Monday and during Monday night is provisionally recorded on tape by an electronic computer as charged to the customer's account. On Tuesday a clerk examines the signature of the item and makes other checks to determine finally whether the item should be paid. If the clerk determines the signature is valid and makes a decision to pay and all processing of this item is complete, e.g., at 12 noon on Tuesday, the "process of posting" is completed at that time. If, however, the clerk determines that the signature is not valid or that the item should not be paid for some other reason, the item is returned to the presenting bank and in the regular Tuesday night run of the computer the debit to the customer's account for the item is reversed or an offsetting credit entry is made. In this case . . . there had been no determination to pay the item, no completion of the process of posting and no payment of the item.

This puts the "payment" of the check at the completion of the bank's ordinary

process, whatever that process may be. The check that passes the bank's internal controls and is posted to the account is "paid". None of the official comments suggests that a check that has been accurately handled in accordance with the bank's ordinary procedure nonetheless may be dishonored any time before the midnight deadline.

Doubtless we must give §4-109(e) meaning, just as we must leave some function for §4-213(1)(c). The Supreme Court of Wisconsin thought the language of §4-109(e) so "plain" that it overrode §4-213(1)(c). West Side Bank v. Marine National Exchange Bank, 37 Wis. 2d 661, 669-72, 155 N.W.2d 587 (1968). That court read the language with this emphasis: "correcting or reversing an entry or erroneous action with respect to the item." The "reversing an entry"

language, the court thought, allowed the bank to dishonor a check at any time before the midnight deadline, whether or not the processing had been completed without error. This reading is inconsistent with the official comments to §4-109 and any plausible reason for making payment final on posting. As a result, the courts that have addressed the problem since 1968 have rejected West Side. Nelson v. Platte Valley State Bank & Trust Co., 805 F.2d 322 (8th Cir. 1986); North Carolina National Bank v. South Carolina National Bank, 444 F. Supp. 616, 620 (D.S.C. 1976); H. Schultz & Sons, Inc. v. Bank of Suffolk County, 439 F. Supp. 1137 (E.D.N.Y. 1977); R. Hoag v. Valley National Bank, 147 Ariz. 137, 708 P.2d 1328 (1985). Students of the subject likewise disagree with the reading of §4-109(e) proposed by West

Side, although they are not entirely in accord on the meaning the section should take. E.g., William D. Hawkland & Lary Lawrence, 5 Uniform Commercial Code Series 323, 339-40, 345-46 (1984); James J. White & Robert S. Summers, Uniform Commercial Code §16-4 & n. 38 (1980); Walter Malcolm, Reflections on West Side Bank: A Draftsman's View, 18 Catholic U. L. Rev. 23 (1968); Note, Bad Checks and the U.C.C. -- When is a Check Finally Paid?, 9 B.C. Ind. & Com. L. Rev. 957 (1968). We think it likely that the Supreme Court of Illinois would follow Nelson and Schultz rather than West Side.

Section 4-109(e) does not simply say that a bank may reverse an entry; the full test of the section says that it may correct or reverse an entry or erroneous action. It is not possible to divorce the "reversing an entry" language from

the words immediately before and after. If we group the words this way -- "(correcting or reversing) an (entry or erroneous action)" -- the statute makes sense. The bank may correct (alter) or reverse (set aside completely) an entry that should not have been made or an "erroneous action" that does not involve an "entry". This reading leaves a role for both §4-109(e) and §4-213(1)(c), and it also makes sense of the official comment to §4-109, which states that when the bank's ordinary process is completed before the midnight deadline, the check has been paid.

Nelson, Schultz, and the commentators on the payments process have stressed that the decision to pay a check has both mechanical and judgmental components. The examination of the signature and the determination that an account has

sufficient funds are mechanical; the decision whether to permit an overdraft in the account is judgmental. Section 4-109 allows a bank to follow its ordinary processes for dealing with both of these. There is nothing magical about putting the instrument in the customer's file. Suppose, for example, the bank mechanically puts all checks in customers' files and then makes random spot checks to verify signatures; that an item with a forged signature had to be pulled form the file to be returned would not prevent its dishonor. Or suppose the bank verifies signatures and puts the checks (stamped "paid") in customers' files before examining the computer printouts for stop payment orders. Again it would not be important that the bank had to remove the stopped check from the customer's file. The alternative --

holding all checks in stasis until each of the bank's steps had been completed -- would delay "final payment" for the checks as a group even longer, contrary to the purpose of §4-213(1)(c). West Side may have been a case of this sort; if it was, we do not question its result even though its language was unduly broad. But none of this assists Devon. Its process -- as Devon defines its process -- had been completed by the afternoon of August 2. All of the check-specific steps, mechanical and judgmental, had been finished to the Bank's satisfaction. The system functioned as it was supposed to. True, Devon may wish that it had told its computer to assume that checks take five rather than four business days to clear, but regret over a managerial judgment in the design of the check processing system

is not a reason to dishonor a check after it has been posted to the account and finally paid.

Devon relies on Brown v. South Shore National Bank, 1 Ill. App. 3d 136, 273 N.E.2d 671 (1st Dist. 1971), for the proposition that Illinois follows West Side. Brown allowed a bank to return a check that had been stamped "paid" and placed in the customer's file. It did not cite West Side and did not discuss the official comment to §4-109. The disposition in Brown is entirely congruent with the one we believe appropriate. The drawer did not have a signature on file with the bank, so its processes apparently had misfired; the bank returned the check when it discovered the error. But the last paragraph of Brown contains this line: "The act of the defendant in returning

the check to plaintiff's bank demonstrated that the posting process was not completed, regardless of the entry on the 'statement of account' and the stamps, placed on the check." 1 Ill. App. 3d at 139; 273 N.E.2d at 673. This statement was unnecessary to the decision and is unreasoned; this dictum does not lead us to believe that the Supreme Court of Illinois will adopt the rationale of West Side. In Go-Tane Service Stations, Inc. v. Sharp, 78 Ill. App. 3d 785, 397 N.E.2d (2d Dist. 1979), another appellate court of Illinois, without citing Brown, implied that the completion of signature checks and placement of the item in the file would prevent dishonor of a check, even if the customer then placed a stop-payment order and the bank returned the check before the midnight deadline. We need not resolve any tension between

Brown and Go-Tane to conclude the the dictum in Brown is not the law in Illinois today.

III

Devon makes one last argument. Merrill Lynch sued Crocker Bank, claiming that it dallied in informing Merrill Lynch of the dishonor of the Manus check. The complaint in that suit states that had Merrill Lynch received timely notice of the dishonor, it could have obtained good funds from Manus to cover the check before Manus entered bankruptcy. Devon says that this is an "admission" that Devon's actions did not injure Merrill Lynch. Nonsense. Merrill Lynch had to mitigate any damages it suffered, and its pleading in the California case says that had it known of the problem, it could have mitigated.

But it did not know, and therefore could not take the necessary steps. Whatever rights Devon may have against Crocker Bank, this pleading is hardly a reason by Merrill Lynch should lose.

REVERSED

APPENDIX B

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 27, 1987

Before
Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC.,	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 87-1333 v.	)
DEVON BANK, an Illinois banking corporation, Defendant-Appellee.	) No. 83 C 2422 George N. Leighton, Judge

ORDER

Defendant-appellee filed a petition for rehearing and suggestion of rehearing en banc on November 12, 1987. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

APPENDIX C

MERRILL LYNCH, PIERCE,
FENNER and SMITH, INC.,
a corporation, Plaintiff,

v.

DEVON BANK, an Illinois banking
corporation, Defendant,

and

DEVON BANK, an Illinois banking
corporation, Third-Party Plaintiff,

v.

CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO,
a national banking association, and
CROCKER NATIONAL BANK, a national
banking association,
Third-Party Defendants

No. 83 C 2422

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

February 23, 1987

Memorandum

Leighton, Senior District Judge

In this diversity action, the plaintiff, Merrill Lynch, Pierce, Fenner and Smith, Inc., brings suit to recover

from defendant, Devon Bank, for its alleged wrongful dishonor of a check. The cause is before the court on Devon's motion for summary judgment. For the following reasons, it appearing that there is no material issue of fact to be resolved and that Devon is entitled to judgment as a matter of law, the motion is granted.

I

On July 26, 1979, Merrill Lynch received a check payable to its order from Manus, Inc. for $647,250.00; it was drawn on Manus' account with Devon in Chicago, Illinois. The next day in Chicago, Manus deposited into its account at Devon a check payable to itself in the identical sum drawn on a Boston, Massachusetts bank by Cash Reserve Management, Inc., a Manus subsidiary.

Merrill Lynch deposited the check it had received from Manus in its account at the Crocker National Bank in Los Angeles, California; and it was placed into the federal reserve banking system for collection. The check was presented to Devon for payment at approximately 9:30 a.m. on Wednesday, August 1, 1979. Wednesday is not a regular business day at Devon. Although its walk-up and drive up teller windows are open until 5:00 p.m. on that day of each week, the bank's lobby is closed on that day. Customers are not served on that day in the service, loan, accounts, and trust departments. The safe deposit box vault is closed to the public on Wednesdays; and no one can call the bank after 1:00 p.m. because its switchboard is closed after that hour.

On Friday, August 3, 1979, at 4:10 p.m., Devon was informed by Continental Illinois National Bank in Chicago that the Cash Reserve Management check was being returned for insufficient funds. As a result, Manus' account at Devon had insufficient funds to pay the Merrill Lynch check. Accordingly, at 4:22 p.m. on August 3, 1979, Devon gave notice it was dishonoring the check it had received on August 1, and returned it to Crocker. The check was received by Crocker on or about August 10; but Crocker attempted to put it through for payment a second time. It was received by Devon again on August 13, dishonored and returned on August 14, 1979. On or about August 28, Manus was placed in receivership and enjoined from paying Merrill Lynch, or any of its other creditors. This ten-count amended

complaint in its pertinent part alleges that the first dishonor of the Merrill Lynch check was untimely; and that Devon was liable to Merrill Lynch for the full amount of the check, plus interest from July 16, 1979.

Devon, in support of its motion for summary judgment, argues that Wednesday, August 1, 1979, the day it received the Merrill Lynch check, was not "a banking day" for its business because it was not a day during which it was "open to the public for carrying on substantially all of its banking functions." Therefore, it had until midnight of its next banking day to have dishonored the check, which it did. For these reasons, Devon contends that as a matter of law it timely dishonored the check received on August 1, 1979; and, as a consequence, its motion for summary judgment should be

granted because Merrill Lynch is not entitled to any relief in this case.

II

Devon's motion for summary judgment can be granted only if it is established that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. Rule 56, Fed.R.Civ.P. To prevail on a motion for summary judgment, the moving party has the burden of establishing that there is no genuine issue of material fact. Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984). Any inference to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. Hermes v. Hein, 742 F.2d 350 (7th Cir. 1984). The existence of a factual dispute, however, only precludes summary judgment if the

disputed fact is outcome-determinative. Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160, 163 (7th Cir. 1984). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." Korf, 726 F.2d at 1226, quoting Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1306 (9th Cir. 1983).

III

Section 4-301(1) of the Illinois Commercial Code, Ill.Rev.Stat., ch. 26, §4-301(1) (1985), provides that a payor bank [Devon] is not accountable for any loss on a check submitted to it for payment if it has not yet made final payment and if before the midnight deadline it returns the item or sends written notice of dishonor. Go-Tane

Service Stations, Inc. v. Sharp, 78 Ill. App. 3d 785, 788, 397 N.E.2d 249, 251 (2d Dist. 1979). Therefore, in order for Devon's motion to be granted, it must show as a matter of law that: (1) the midnight deadline was met; and (2) no final payment was made.

Section 4-104(1)(h) states that "midnight deadline"

> with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later. Ill.Rev.Stat., ch. 26, §4-104(1)(h) (1985).

A "banking day" is defined as:

> that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions. Ill.Rev.Stat., ch. 26, §4-104(1)(c) (1985) [emphasis added].

Devon received the Merrill Lynch check on Wednesday, August 1. If this was one of its "banking days" then Devon's

midnight deadline for return of the check would have been midnight, August 2, the "next banking day following the banking day on which it receive[d]" the check. Devon points out, however, that Wednesday was not a banking day for it because it was not open to the public for carrying on substantially all of its banking functions. Thus, Devon contends that because Wednesdays are not banking days in its business, the banking day it first received the check was Thursday, August 2; consequently, it had until midnight August 3 to dishonor the check. Merrill Lynch, on the other hand, contends that Wednesday was a banking day for Devon, and the deadline to dishonor the check was therefore midnight on Thursday, August 2, 1979.

What constitutes a "banking day" is clearly and unambiguously defined in §4-

104(1)(c). A banking day is where a bank is "open to the public for carrying on substantially all of its banking functions." It is clear from the record that Devon was not "open to the public" on Wednesday, August 1. Numerous factors point to this: the bank's lobby was closed on that day;[1/] customers were denied all the services of the loan department and accounts department, as well as the trust department; the customer service department and safe deposit box vault were also closed to the public. In addition, the public could not contact the bank after 1:00 p.m., as the switchboard was closed after that time. Therefore, while the bank was open to bank personnel, it is evident that it

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[1/] Devon's walk-up and drive-up teller windows were open until 5:00 p.m. on August 1.

was closed to the public. Merrill Lynch argues that because the walk-up and drive-up windows were open, the bank was open to the public. However, customers could only perform a few selected types of transactions at these windows. They are usually limited to depositing and withdrawing money from existing accounts. This limitation evidences that the bank was not open for all of its banking functions. Accordingly, since Wednesday, August 1, 1979, was not a banking day, Devon had until midnight, August 3, to dishonor the check. The check was, in fact, dishonored at 4:22 p.m. on August 3, 1979; before the midnight deadline.

The issue regarding final payment remains. If, as a matter of law, Devon did not make final payment, its motion for summary judgment must be granted.

See Ill.Rev.Stat. ch. 26, §4-301(1) (1985); Go-Tane Service Stations, 78 Ill. App. 3d at 788, 397 N.E.2d at 251. Final payment of an item by a payor bank occurs when the bank has:

> (a) paid the item in cash; or
>
> (b) settled the item without reserving a right to revoke the settlement and without having such right under statute, clearinghouse rule or agreement; or
>
> (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
>
> (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule or agreement.

Section 4-213(1), Illinois Commercial Code, Ill.Rev.Stat. ch. 26, §4-213(1) (1985).

Merrill Lynch argues that final payment was made under this section, relying primarily on the "completed

process of posting," subsection (c) of §4-213(1). It contends Devon completed the process of posting after it verified signatures on the check, debited the proper account, affixed paid stamps, and corrected or reversed erroneous entries made on return of items. Devon, however, argues that final payment was not made, relying primarily upon §4-109 of the Illinois Commercial Code, Ill.Rev.Stat., ch. 26, §4-109 (1985), which defines the "process of posting" as:

> The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment, including one or more of the following or other steps as determined by the bank:
>
> (a) verification of any signature;
>
> (b) ascertaining that sufficient funds are available;
>
> (c) affixing a "paid" or other stamp;

(d) entering a charge or entry to a customer's account;

(e) correcting or reversing an entry or erroneous action with respect to the item.

Devon contends that the process of posting was not completed, relying specifically on §4-109(e), which allows for the "correcting or reversing of an entry" before posting is considered fully completed.

It is clear the process of posting involves completion of several steps, one of which is the "correcting of erroneous actions." That some of the steps listed in §4-109 were taken does not mean the process was completed. See Brown v. South Shore National Bank, 1 Ill. App. 3d 136, 273 N.E.2d 671 (1st Dist. 1971). Merrill Lynch contends the "correcting of erroneous actions" was finished thus posting completed after Devon personnel made the necessary correcting of entries

and reversing of payments made in error during computer processing.

"Correcting an erroneous action" in Brown was found to include allowing a drawee bank to correct an error even after the drawee bank had completed processing and paid on the check. The court reasoned that according to §4-213(1)(c), a check is finally paid when the bank has "completed the process of posting"; and that under §4-109, the process of posting involves several steps, only some of which had been accomplished. The court emphasized that §4-109(e) referred to "correcting or reversing an entry or erroneous action with respect to the item"; and that the affixation of stamps and the entry on the customer's account were but part of the process. Also included was the judgmental step of signature verification

and, if necessary, correction or reversal of erroneous action. Brown, 1 Ill. App. 3d at 139, 273 N.E.2d at 673.

Here, as in Brown, the "correcting an entry or erroneous action" which is provided by §4-109(e) allowed Devon, after learning that the Manus account had insufficient funds, to correct the entry which erroneously indicated that the funds were sufficient. In this regard, Devon's returning the check to Crocker demonstrated that the posting process was not completed, regardless of the entry on the statement of account and the stamps, placed on the check. Brown, 1 Ill. App. 3d at 139, 273 N.E.2d at 673. Accordingly, final payment was not made by Devon because the posting process was not completed until it was allowed to correct the erroneous entry. Ill.Rev.Stat. ch. 26, §4-213(1) (1985).

In summary, since final payment was not made, and because Devon met its midnight deadline by making a timely dishonor of the check on August 3, 1979, at 4:22 p.m., it is not liable on the check. Ill.Rev.Stat. ch. 26, §4-301(1) (1985). It is for these reasons that Devon's motion for summary judgment is granted, and judgment will be entered in its favor. An appropriate order may be proposed by the parties with regard to the remaining issues in this case.

On the Motion for Reconsideration

In its simplest terms, this case presents one issue -- did the defendant bank dishonor the check in question before its midnight deadline and before making final payment. If it did, the bank is entitled to judgment. Ill.Rev.Stat. ch. 26, §4-301(1) (1985). On April 11, 1986, the court issued a

memorandum opinion and accompanying order concluding that both these requirements were satisfied and that no question of material fact existed; it accordingly entered judgment for defendant. Plaintiff moves for reconsideration; its motion is limited to the issue of final payment.

A payor bank makes final payment if, among other things, it completes the process of posting or makes a provisional settlement and fails to revoke in time and manner permitted by statute, clearing house rule or agreement. Ill.Rev.Stat. ch. 26, §4-213(1)(c)(d) (1985). The court concluded in its April 11, 1986 memorandum that the process of posting was not completed; therefore, final payment was not made in that manner. For the reasons stated in that memorandum,

the court adheres to its original ruling on this issue.

With regard to the timely revocation of the provisional settlement, plaintiff argues that because defendant did not revoke settlement within the time provided by clearing house rules, final payment was made pursuant to §4-213(1)(d). Plaintiff misconstrues the statute. Under §4-213(1)(d), if settlement is revoked in a time provided by either statute or clearing house rule, final payment is not made. J. White and R. Summers, Handbook of the Law Under the Uniform Commercial Code, §16-4 at 622 (2d ed. 1980). In other words, if the time to revoke settlement has lapsed under either clearing house rule or statute, but not under both, the bank has "that additional time to return the item or

give notice of dishonor before payment is deemed final . . . ." Id. at 622.

In this case, because defendant revoked settlement in a time provided by statute, Ill.Rev.Stat. ch. 26, §4-301(1) (1985), that is before its midnight deadline, final payment was not made; this is true even assuming that the deadline set out in the clearing house rule was not met. Further, nothing in the clearing house rule cited by plaintiff indicates an intent to override the statute's midnight deadline; the court will not presume such an intent. See Colorado Nat. Bank v. First Nat. Bank, 459 F. Supp. 1366, 1372 (W.D. Mich. 1978); cf. Berman v. United States Nat. Bank, 197 Neb. 268, 249 N.W.2d 187, 198-99 (1976).

In summary, because the defendant dishonored the check before its midnight

deadline and before making final payment, it is entitled to judgment as a matter of law. Accordingly, plaintiff's motion to reconsider is granted and after further consideration, the court adheres to its original ruling granting defendant's motion for summary judgment.

So ordered.

APPENDIX D

APPENDIX D

Case Law In Other States

Merrill Lynch's attempt to rely on the other cases it cites is similarly unavailing. First, none of those cases involves Illinois law, and it is Illinois law that governs here. Second, an analysis of those cases demonstrates that they are distinguishable and that one of the decisions implicitly supports Devon's position.

In Consolidated Cigar Company v. Texas Commerce Bank, 749 F.2d 1169 (5th Cir. 1985), the Court did not purport to construe Subsection 4-109(e).

North Carolina National Bank v. South Carolina National Bank, 449 F.Supp. 616 (D.S.C. 1976), affd. 573 F.2d 1305, cert. den. 439 U.S. 985, 99 S.Ct. 577, 58 L.Ed.2d 657 (1978), is inapposite. In that case, the defendant payor bank made

a decision to pay the check even though it was aware that its insufficient funds report showed that there were insufficient funds in the account. (A week later the bank tried to return the check because of the lack of an endorsement.) That is the opposite of the present case; Devon was not aware of an insufficiency of funds in the Manus account until Devon learned of that fact on the afternoon of August 3.

In H. Schultz & Sons, Inc. v. Bank of Suffolk County, 439 F.Supp. 1137 (E.D.N.Y. 1977), the defendant bank sought to return a check after it learned of, and only because of, the maker's bankruptcy. The Court held that under those circumstances, the defendant could not rely on Section 4-109(e) to justify its return of the check. In the course of its opinion, however, the Court

discussed the fact that errors can be made both in the mechanical acts of recording payment and in the decision making acts of determining to pay an item (like ascertaining that sufficient funds are available). The Court observed (439 F.Supp. at 1140) that

> ". . . an error made in the 'determining to pay' part of the process of posting should be just as capable of correction prior to the midnight deadline as would be a typographical or mechanical error in 'recording the payment'."

Thus, if anything, Schultz supports the decision of the District Court in Devon's favor in the instant case. In Schultz, the bank returned the maker's check based solely on the maker's bankruptcy. Schultz stands for the proposition that under Section 4-109(e), an error made in any of the first four steps of the process of posting [listed

in Sections 4-109(a)-(d)] can be corrected before the bank's midnight deadline.